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No. 86-6139

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

CLARA WATSON,
Petitioner,
v.
FORT WORTH BANK & TRUST,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR *AMICUS CURIAE* THE MERCHANTS AND MANUFACTURERS ASSOCIATION IN SUPPORT OF RESPONDENT

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BRIEF FOR *AMICUS CURIAE* THE MERCHANTS AND MANUFACTURERS ASSOCIATION IN SUPPORT OF RESPONDENT

The Merchants and Manufacturers Association respectfully submits this brief *amicus curiae* pursuant to the written consents of the parties.[1]

INTEREST OF AMICUS CURIAE

The Merchants and Manufacturers Association is a voluntary, non-profit California corporation organized for the purpose of providing assistance and support to its member firms in the area of human resources management. The Association has approximately 3,000 member companies that employ approximately 1.5 million employees throughout the State of California.

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[1] These consents have been filed with the Clerk of the Court.

As part of the support it provides to its members, the Association monitors legislation or litigation that bears directly on employment issues. Where litigation raises particularly significant issues, the Association has often elected to participate as an *amicus curiae* to provide the courts with information concerning the practical impact of decisions on day-to-day personnel management.

The Court's resolution of the issue raised by this case—whether so-called "subjective" employment decisions must be validated professionally or otherwise shown to represent a "business necessity" whenever they have a significant adverse impact on any identifiable race, sex or ethnic group—will have profound consequences for the Association's members. In jobs that are not governed by collective bargaining agreements or civil service requirements, the overwhelming majority of personnel decisions that are made each day in the American workplace are subjective in nature, in the sense that they depend on the judgment of individual managers and supervisors rather than mechanical criteria or formulae. Petitioner in this case seeks to establish an interpretation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, ("Title VII"), that would present employers with a Hobson's choice if they wish to avoid liability under Title VII for these types of personnel decisions—an employer would either have to spend huge sums on professional validation studies for all of its personnel decisions which might or might not withstand challenge or it would have to adopt informal quotas to ensure that personnel decisions never adversely impact any identifiable group. Such an interpretation would seriously impair the ability of the Association's members to engage in cost-effective and efficient personnel decisionmaking while complying with their legal obligation to ensure equal employment opportunity for each individual without regard to race, sex, religion or national origin.

SUMMARY OF ARGUMENT

In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), this Court held that Title VII forbids the use of facially neutral employment standards and requirements, such as standardized intelligence test scores or a high school diploma requirement, that have an adverse impact on a particular race, unless the employer meets "the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question." *Id.* at 432. In so holding, this Court created a narrow exception to Title VII's requirement that discriminatory intent be shown. It did so in order to prevent the denial of employment opportunities to blacks by means of non-job-related objective requirements that would be difficult or impossible to attack as intentionally discriminatory. The Court, however, imposed on the employer the burden of showing job-relatedness only after the plaintiff in *Griggs* had (1) identified a specific objective employment standard or requirement and (2) demonstrated that application of this standard was causally linked to a significant adverse impact on a particular group.

Subsequent to *Griggs*, this Court has applied the adverse impact test only in cases dealing with an objective employment requirement or standard, *i.e.*, a standard having a fixed content that is applied mechanically and automatically without the exercise of discretion or judgment by the individual making the employment decision. Only in cases such as these have plaintiffs been able to meet the burden established by *Griggs* of identifying a specific employment standard or practice that is causally linked to adverse impact.

At the same time, this Court in disparate treatment pattern and practice cases such as *Hazelwood School District v. United States*, 433 U.S. 299 (1977), and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), has developed an alternative means for analyzing statistical disparities that cumulatively result

from a large number of subjective employment decisions, *i.e.*, decisions involving the application of numerous criteria and standards to different applicants and employees in widely divergent jobs based on the judgments of different supervisors and managers. This Court has implicitly found applying the adverse impact test to such situations impractical, since plaintiffs in these cases cannot identify a specific employment standard or requirement that causes adverse impact and that can be assessed for job-relatedness. Instead, in cases where no specific standard or requirement can be identified because of the subjective nature of the decisionmaking process, this Court has held that plaintiffs' evidence should be examined to determine whether it proves discriminatory intent. In attempting to prove discriminatory intent, a plaintiff may rely on direct evidence of discrimination or on a wide range of circumstantial evidence, including evidence of statistical disparities or comparative anecdotal evidence.

In this case, petitioner asks this Court to collapse this established dichotomy for analyzing statistical disparities in Title VII cases. Petitioner below demonstrated that the cumulative effect of hundreds of subjective employment decisions made by different managers applying different standards and criteria to employees in different jobs resulted in a statistical disparity between the promotion rate and performance appraisal results of black and white employees of respondent Fort Worth Bank & Trust ("the Bank"). Petitioner could not point to any particular job standard or requirement that allegedly caused this statistical disparity. Instead, in light of this disparity, petitioner contends that her employer must now demonstrate the job-relatedness of its entire employment selection procedure as it is applied by every manager or supervisor to every job at the Bank.

Such a repudiation of the well-established differences between adverse impact and disparate treatment pattern

and practice cases would have dire consequences for employers. Few employers, particularly smaller ones with limited resources, could afford to obtain professional validation of each and every aspect of subjective employment decisionmaking in order to protect against Title VII liability in case such decisions cumulatively result in a significant adverse impact on an identifiable race, sex or ethnic group. Fewer still would be willing to risk second guessing whether a court would find a particular validation study acceptable, where the penalty for a wrong guess could be millions of dollars of backpay. Instead, the vast majority of employers would be forced to avoid potentially massive Title VII liability by avoiding adverse impact through the adoption of an informal quota system. Such a result is squarely contrary to the intent of Congress embodied in Title VII.

Ultimately, the adoption of petitioner's position would change the face of Title VII litigation. Few plaintiffs, if any, would continue to bring pattern and practice disparate treatment cases in which they would have to adduce evidence of discriminatory intent. Instead, by merely establishing a statistical disparity, they could shift the burden of proof and force an employer to demonstrate that the full range of its practices are not only nondiscriminatory, but job-related as well. In the final analysis, Title VII would cease to exist as a statute guaranteeing equal employment *opportunity* primarily by forbidding intentional discrimination and instead would become a statute guaranteeing equality of employment *results* for every race, sex and ethnic group. Because this is plainly contrary to Title VII, petitioner's position should be rejected and the judgment of the Court of Appeals affirmed.

ARGUMENT

I. THIS COURT HAS PROPERLY LIMITED APPLICATION OF THE *GRIGGS* ADVERSE IMPACT TEST TO CASES IN WHICH AN OBJECTIVE EMPLOYMENT STANDARD IS CHALLENGED.

In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Court held that an employer violated Title VII by denying employment opportunities to black employees based on the results of intelligence test scores and a high school diploma requirement, where the employer had failed to meet "the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question." *Id.* at 432. In *Griggs*, the plaintiff identified two specific employment requirements or standards and demonstrated that application of these requirements was causally linked to an adverse impact on the selection of blacks. The Court specifically stressed the element of causation:

> [o]n the record in the present case, "whites register far better on the Company's alternative requirements" than Negroes. 420 F.2d 1225, 1239 n.6. *This consequence would appear to be directly traceable to race.* Basic intelligence must have the means of articulation to manifest itself fairly in a testing process. Because they are Negroes, petitioners have long received inferior education in segregated schools and this Court expressly recognized these differences in *Gaston County v. United States*, 395 U.S. 285 (1969).

Id. at 430 (footnote omitted and emphasis added).[2]

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[2] The Court appropriately stressed this element of causation given its reliance on the language of Section 703(a)(2) of Title VII, 42 U.S.C. § 2000e-2(a)(2), in fashioning the adverse impact test. *See Connecticut v. Teal*, 457 U.S. 440, 445-46 (1982) (noting reliance in *Griggs* on Section 703(a)(2)). Section 703(a)(2) forbids an employer to limit, segregate or classify employees in any manner that may adversely affect employment status or opportunities *"because* of such individual's race, color, religion, sex, or national origin" (emphasis added).

The employer in *Griggs* had adopted the diploma and intelligence test requirements on the same date Title VII became effective, 401 U.S. at 427-28. As such, the requirements were an obvious attempt to circumvent the equal employment opportunity requirements of Title VII. Nevertheless, the plaintiff had been unable to prove that these requirements were adopted with discriminatory intent. 401 U.S. at 432. Moreover, because these requirements were objective and left no discretion to individual decisionmakers, it was equally difficult to prove discriminatory intent in the application of these requirements.

Griggs thus presented the Court with a loophole in Title VII that certain employers could exploit to deny employment opportunities to blacks. The only way to close this loophole was to require employers to show the job-relatedness of objective requirements which caused an adverse impact and which could not readily be challenged as intentionally discriminatory. Accordingly, the court in *Griggs* created a narrow exception to the general requirement of proof of discriminatory intent that was clearly intended by Congress in enacting Title VII. *See infra*, at 14-15.

In keeping with this purpose, this Court subsequent to *Griggs* has limited application of the adverse impact test in every case it has decided to situations where plaintiffs: 1) identified a specific objective employment standard or requirement and 2) demonstrated that application of the standard or requirement caused an adverse impact. Thus, in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), another case dealing with objective employment tests that caused adverse impact, this Court emphasized:

> This burden [of showing job-relatedness] arises, of course, only after the complaining party or class has made out a prima facie case of discrimination, *i.e.*, has shown that the tests in question select applicants

> for hire or promotion in a racial pattern significantly different from that of the pool of applicants.

Id. at 425.

Similarly, in *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977), the Court had before it evidence that the overall hiring process for correctional counselors in the Alabama prison system had produced a substantial statistical disparity in the hiring of women. *See id.* (noting that women age 14 or older constitute 36.89% of the Alabama labor force, but only 12.9% of the correctional counselors). Nevertheless, the Court did not require the employer to prove the job-relatedness of each and every employment standard used in the hiring process. Instead, it required plaintiffs to identify a specific objective requirement—in this case a height and weight requirement—and prove that it caused an adverse impact. *Id.* at 330-31. *See also Id.* at 348-49 (White, J., dissenting) (plaintiff failed to prove *prima facie* case because general population statistics insufficient to prove that height and weight standard caused adverse impact).[3]

Most recently, in *Connecticut v. Teal*, 457 U.S. 440 (1982), another case dealing with an objective employment test, this Court again emphasized that the adverse impact test only applies to specifically identified employment standards or requirements that are causally linked to an adverse impact. In rejecting an employer's reliance on a "bottom line" defense, the Court noted:

> In considering claims of disparate impact under § 703(a)(2) this Court has consistently focused on employment and promotion requirements that create

[3] In *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979), this Court likewise required plaintiffs who brought an adverse impact challenge to identify a specific objective job requirement—in this case, exclusion of methadone users from specific jobs—and to prove that this requirement caused an adverse impact. Plaintiffs' claim failed because they failed to prove that the requirement caused an adverse impact. *Id.* at 584-86.

> a discriminatory bar to *opportunities*. This Court has never read § 703(a)(2) as requiring the focus to be placed instead on the overall number of minority or female applicants actually hired or promoted.

Id. at 450 (underlining added).

Thus, in every adverse impact case this Court has considered, plaintiffs have been required to identify a specific employment standard or requirement and prove that its application causes adverse impact. Plaintiffs have never been able to meet this burden in cases involving subjective decisionmaking, and this Court has accordingly refused to apply adverse impact analysis in such cases. For example, in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), plaintiff challenged his employer's refusal to re-hire him because he participated in an illegal "stall-in." Plaintiff, however, offered no evidence suggesting that the Company had adopted an objective standard or requirement excluding from employment all persons who had engaged in unlawful conduct or that such a standard, if applied generally, would have had an adverse impact on blacks. This Court, therefore, held that the Court of Appeals had erred in analyzing the case under the *Griggs* adverse impact test. *Id.* at 805-06. It noted:

> *Griggs* differs from the instant case in important respects. It dealt with standardized testing devices which, however neutral on their face, operated to exclude many blacks who were capable of performing effectively in the desired positions. . . . Respondent, however, appears in different clothing. . . . And [his employer] does not seek his exclusion on the basis of a testing device which overstates what is necessary for competent performance, or through some sweeping disqualification of all those with any past record of unlawful behavior, however remote, insubstantial, or unrelated to applicant's personal qualifications as an employee. Petitioner assertedly rejected respondent for unlawful conduct against it

> and, in the absence of proof of pretext or discriminatory application of such a reason, this cannot be thought the kind of "artificial, arbitrary, and unnecessary barriers to employment" which the Court found to be the intention of Congress to remove.

Id. at 806.

Similarly, in *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), the Court held that plaintiffs could not mount an adverse impact challenge to hiring decisions made by a superintendent based on his subjective assessment of competence and experience derived from personal work experience or recommendations. The Court noted:

> We agree with the Court of Appeals that the proper approach was the analysis contained in *McDonnell Douglas, supra*.[7]

[7] This case did not involve employment tests, which we dealt with in *Griggs* . . . and in *Albemarle Paper Co.* . . . or particularized requirements such as the height and weight specifications considered in *Dothard* . . . .

Id. at 575 & n.7.[8]

[8] The Court of Appeals' determination, with which this Court agreed, similarly held:

> As we understand the *Griggs* principle, it provides a method for establishing the presence of discrimination where application of a test to a group of employees or applicants results in a proportionally higher rate of rejection of members of a minority group. Here the reliance upon the superintendent's recollection of bricklayers he considered competent was not a test or device for comparing the members of a group of prospective employees, for there was no defined group . . . .
>
> * * * *
>
> . . . This was not a case, like *Griggs*, of comparing white and black applicants by objective, but irrelevant standards, and rejecting more blacks, proportionally, than whites.

Waters v. Furnco Constr. Corp., 551 F.2d 1085, 1089-90 (7th Cir. 1977), *rev'd on other grounds*, 438 U.S. 567 (1978).

These subsequent decisions limiting application of the *Griggs* test to objective employment standards or requirements necessarily follow from the focus in *Griggs* on whether a specific job requirement or standard causes an adverse impact and if so, whether the standard can be justified as job-related.[5] *Griggs*, 401 U.S. at 431. Only in such cases do facially neutral standards constitute unlawful "'built-in headwinds' for minority groups [that] are unrelated to measuring job capability." *Id.* at 432.

This inquiry can readily be applied to objective employment standards or requirements. Because such requirements have a fixed content and are automatically and mechanically applied, one can readily determine whether the standard or requirement causes an adverse impact by examining its effect on a large group of people, usually either the employer's workforce[6] or the gen-

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[5] On occasion this Court has referred to this inquiry as an assessment of whether a particular standard represents a "business necessity." *Griggs*, 401 U.S. at 431. This Court, however, has never required a true showing of business necessity, *i.e.*, proof that a standard having a disparate impact is so vital that an employer could not do business without it. *See, e.g., New York City Transit Authority v. Beazer*, 440 U.S. at 587 n.31 (exclusion of methadone users from positions with transit authority held lawful, even if it caused adverse impact, where goals of efficiency and safety "are significantly served by—*even if they do not require*—[such] rule . . . .") (emphasis added). Applying a strict test of business necessity in adverse impact cases would in many cases result in identical treatment for facially neutral requirements and requirements that expressly discriminate on their face on the basis of sex, religion or national origin. *See* 42 U.S.C. § 2000e-2(e) (classifications that expressly discriminate on the basis of sex, religion or national origin are lawful if they constitute "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .").

[6] *See, e.g., Griggs*, 401 U.S. at 430 n.6 (adverse impact shown where applying test to workforce resulted in 58% of whites passing test but only 6% of blacks).

eral population.[7] Assessing job-relatedness is also feasible in the case of an objective standard because it has a fixed content that can be examined to determine if it accurately measures qualifications related to the successful performance of a particular job. *See, e.g., United States v. South Carolina*, 434 U.S. 1026 (1978), *aff'g per curiam*, 445 F. Supp. 1094, 1112 (D.S.C. 1977) (3-judge court) (state-sponsored objective teacher examination was job-related where "the content of the tests matches the content of the teacher training programs in South Carolina").

By contrast, subjective decisionmaking processes are not susceptible to analysis under the adverse impact test. In the first instance, identifying specific employment standards or requirements that are applied as part of a subjective decisionmaking process is difficult or impossible. For example, in this case petitioner concedes that promotion decisions at the Bank were not based on a single identified standard, but instead involved individual judgments about numerous criteria such as previous supervisory experience, leadership, ability to get along with others, and general experience (Pet. Br. at 8).

Second, even if a specific standard or requirement is identified, assessing whether application of the standard has caused an adverse impact on a particular group is impossible in the subjective decisionmaking context. Subjective standards, such as the ability to get along with people or leadership qualities, are not applied mechanically or automatically. Instead, each such standard is considered as one of several factors in assessing the overall qualifications of a particular candidate. Because of this multi-faceted process, ascertaining whether the appli-

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[7] *See, e.g., id.* at 430 n.6 (adverse impact of high school diploma requirement shown where 1960 census data showed that 34% of white males in North Carolina had completed high school, but only 12% of black males).

cation of a particular standard has had an adverse impact on a particular race, sex or ethnic group is virtually impossible. *See, e.g., Pouncy v. Prudential Ins. Co. of America*, 668 F.2d 795, 801 (5th Cir. 1982) (noting that "[a]ptitude tests, height and weight requirements, and similar selection criteria all may be shown to affect one class of employees more harshly than another" while plaintiff "has not shown, nor can he show, that independent of other factors the [subjective] employment practices he challenges have caused the racial imbalance in [the employer's] work force.")

Because analysis of subjective decisionmaking under the adverse impact test does not identify a specific job standard or requirement that is causally linked to an adverse impact, making a determination of job-relatedness is also difficult or impossible. Thus, for example, under petitioner's view, the employer in this case is not just required to establish job-relatedness for a specific standard or requirement—such as consideration of prior supervisory experience in promotion decisions or assessment of physical fitness in performance appraisals. Instead, the employer must justify as job-related the entire range of standards it applies in its subjective decisionmaking processes whether or not any particular standard has been identified as causing an adverse impact.[8] Such an enormously burdensome requirement goes far beyond the limited holding in *Griggs* and its progeny which require a showing of job-relatedness only for specific job qualifications or requirements that are causally linked to an adverse impact. *See, e.g., Pouncy*, 668 F.2d at 801 ("[w]e do not permit a plaintiff to challenge an entire range of employment practices merely because the employer's work force reflects a racial imbalance that might be causally related to any one or more of several practices. . . ."); *Latino Unidos de Chelsea En Accion v. Secretary of HUD*, 799 F.2d 774, 786 (1st Cir. 1986) ("[a]t least in

[8] *See* Pet. Br. at 62.

this case, the disparate impact model is inappropriate because plaintiffs point to no specific practice—objective *or* subjective—that allegedly caused a discriminatory impact on minorities. They claim only that Chelsea employs a disproportionately low number of minorities.").

Precluding application of the *Griggs* test to subjective employment decisions is also consistent with the nature of subjective decisionmaking. The *Griggs* test was adopted to avoid the difficulty of proving that an objective requirement which leaves no discretion to individual decisionmakers is intentionally discriminatory. By contrast, subjective employment decisions depend on the judgment and discretion of individual decisionmakers and by their very nature are governed by intent and motivation. *See* 3 A. Larson & L. Larson, *Employment Discrimination* § 76.34 at 15-87 to 15-88 (1987). Accordingly, it is appropriate to focus on whether the intent of the decisionmaker was tainted by discriminatory animus. *See* Note, *Evaluation of Subjective Selection Systems in Title VII Employment Discrimination Cases: A Misuse of Disparate Impact Analysis*, 7 Cardozo L. Rev. 549, 580-82 (1986).

Limiting the *Griggs* test to objective standards and requirements is also consistent with Title VII's emphasis on prohibiting discriminatory intent. As this Court has noted, "[u]ndoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII." *International Brotherhood of Teamsters v. United States*, 431 U.S. at 335 n.15. Even one group of *amici* supporting petitioner likewise concedes that "[e]liminating *intentional* discrimination was the first and most important goal of Congress in 1964."[9] This observation is confirmed by Title VII's legislative history. Senator Humphrey (D. Minn.), for example, one of the main proponents of Title VII, observed that "[s]ince the title

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[9] Brief of *Amici Curiae* State of Texas, *et al.*, at 12 (emphasis in original).

bars only discrimination because of race, color, religion, sex or natural [sic] origin it would seem . . . to require intent." 110 Cong. Rec. 12,723-24 (1964). *See also* 110 Cong. Rec. 7213 (1964) (interpretative memorandum of Sens. Clark and Case) (noting that meaning of discrimination is "clear and simple" and refers to "mak[ing] a distinction . . . [or] difference in treatment or favor" because of prohibited classification); 110 Cong. Rec. 7477 (1964) (Bipartisan Civil Rights Newsletter submitted by Title VII proponents) (same). The *Griggs* rule represents a narrow exception to this general principle that was adopted to prevent circumvention of Title VII by resort to non-job-related objective requirements. This exception should not be expanded beyond its current limited scope.

II. THE *GRIGGS* TEST MAY NOT IN ANY EVENT BE APPLIED IN CASES SUCH AS THIS WHERE PLAINTIFF HAS FAILED TO IDENTIFY A PARTICULAR EMPLOYMENT STANDARD OR JOB REQUIREMENT THAT HAS CAUSED AN ADVERSE IMPACT.

As noted above, a majority of this Court in *Furnco Construction* held that a subjective process of hiring bricklayers was not susceptible to analysis under the *Griggs* adverse impact test. Justice Marshall, joined by Justice Brennan, in dissent contended that the subjective hiring process could be analyzed under the *Griggs* test if plaintiff proved that "a particular practice in actuality 'operates to exclude Negroes.'" *Furnco Construction Corp. v. Waters*, 438 U.S. at 583. Even under the dissenters' view, however, the employer was not obligated to demonstrate the job-relatedness of its entire subjective hiring process merely because it had hired proportionately fewer blacks than whites. Rather, the dissenters noted that the *Griggs* test would be applicable if plaintiff identified a specific job requirement or standard that was causally linked to an adverse impact:

> Under this principle, a practice of limiting jobs to those with prior experience working in an industry or for a particular person, or to those who hear about jobs by word of mouth would be invalid if the practice in actuality impacts more harshly on a group protected under Title VII, unless the practice can be justified by business necessity.

Id.[10]

Thus, even under the view expressed by the dissenters in *Furnco*, a plaintiff must identify a specific employment standard or requirement that causes an adverse impact in a subjective decisionmaking process in order to make out a *prime facie* case of adverse impact. Petitioner has failed to meet this burden in this case. While Petitioner in her brief identifies a number of specific standards and requirements that are used by the Bank in assessing performance and making promotion decisions,[11] petitioner has failed to show that the application of any of these requirements has caused an adverse impact on black employees. Instead, petitioner has merely pointed

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[10] Limiting hiring to persons who hear about a job by word of mouth on its face is not a job qualification or standard, but such a procedure implicitly carries with it a specific requirement for hiring, *i.e.* personal acquaintance with someone in the employer's workforce.

[11] Petitioner, for example, notes that promotion decisions have been based on previous supervisory experience, leadership, ability to get along with others and general experience. Pet. Br. at 8. Performance appraisals are based on an assessment of accuracy of work, alertness, personal appearance, supervisor-co-worker relations, quantity of work, physical fitness, attendance, dependability, stability, ambition, friendliness, courtesy, job knowledge, and experience. *See* Pet. App. 23a n.26; Tr. III32-III45, III75-III76. *Amicus* American Psychological Association contends that the job-relatedness of certain of these criteria, *e.g.*, physical fitness, is questionable. Brief of *Amicus Curiae* American Psychological Association ("APA Br.") at 25. Petitioner, however, has not pointed to any evidence suggesting that blacks were rated lower on the physical fitness criteria than whites.

to an overall statistical disparity in black and white promotion rates and performance appraisals that cumulatively has resulted from hundreds of subjective employment decisions by different supervisors applying a wide range of criteria and qualifications to employees in a number of different jobs. Petitioner has sought to avoid identifying a particular job standard or qualification that is causally linked to this disparity by claiming that the application of varying standards in the hundreds of employment decisions at issue constitutes a single "procedure"—subjectivity in personnel decisionmaking—which must be validated under the *Griggs* test.[12]

The requirements of *Griggs* cannot be so easily evaded. Subjectivity in personnel decisionmaking is not a standard, qualification or requirement susceptible to analysis under the *Griggs* test for job-relatedness. At most, the particular standards and criteria that are applied in the subjective decisionmaking process—*e.g.*, subjective consideration of prior work experience in the industry—are subject to potential scrutiny for job-relatedness under *Griggs*. Such standards and criteria, however, need only be so scrutinized if the plaintiff has proven that application of the standard causes an adverse impact. Petitioner has not done so in this case.

This Court has devised a separate method for analyzing cases like the instant one where plaintiffs point to a statistical disparity in the cumulative results of hiring or promotion decisions, but where plaintiffs fail to identify a specific employment standard or requirement that has caused an adverse impact. Cases such as these are analyzed as pattern and practice disparate treatment

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[12] Indeed, petitioner has not even focused on a particular job or group of jobs within the Bank, but instead has relied solely on a disparity that cumulatively results from employment decisions affecting numerous different jobs. Petitioner claims that, in light of this overall disparity, promotion and appraisal procedures must be validated for *all* jobs at the Bank.

cases under the standards set forth in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324. In such a case, the plaintiff has the burden of proving "more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts," but must instead "establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure—the regular rather than the unusual practice." *Id.* at 336. "Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment." *Id.* at 335 n.15.

This Court has never indicated that the mere existence of a statistical disparity in overall hiring or promotion decisions may be analyzed under the adverse impact test so as to require an employer to justify as job-related every decision that contributed to the disparity.[13] To the contrary, this Court in *Hazelwood School District v. United States*, 433 U.S. 299 (1977), was specifically confronted with a statistical disparity in the hiring of blacks that resulted from "relatively unstructured procedures in hiring" in which individual principals "possessed virtually unlimited discretion in hiring teachers" based on their subjective determination of which applicant was "the 'most competent' person available." *Id.* at 301-02. This Court analyzed the case under the disparate treatment pattern and practice test established by *Teamsters*, rather than requiring the employer to demonstrate that

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[13] In *Teamsters*, the Court did note that "[e]ither theory [disparate impact or disparate treatment] may, of course, be applied to a particular set of facts." 431 U.S. at 335 n.15. At most, this ambiguous *dictum* suggests that certain fact situations may exist, *e.g.*, where a specific employment requirement having a disparate impact is used *and* an overall pattern of intentional discrimination is evident, where adverse impact and disparate treatment theories may both apply. The statement, however, by no means indicates that each theory is fully applicable to every set of facts.

each requirement or standard applied in its entirely subjective hiring process was job-related. *Id.* at 307.[14]

Petitioner complains that proving discriminatory intent under a disparate treatment theory is a "virtual impossibility." Pet. Br. at 56. The courts, however, have recognized a wide range of evidence that plaintiffs can use to establish discriminatory intent. *See* B. Schlei & P. Grossman, *Employment Discrimination* 1314 (2d ed. 1983) (discriminatory intent may be shown by direct evidence, comparative evidence, and/or statistics).[15] In particular, the existence of substantial statistical disparities can provide compelling evidence of discriminatory intent where the employer is unable to offer any nondiscriminatory explanation for the disparity. Only recently this Court emphasized:

> [I]t is clear that a regression analysis that includes less than "all measurable variables" may serve to prove a plaintiff's case. A plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather, his or her burden is to prove discrimination by a preponderance of the evidence. . . . [A]s long as the court may fairly conclude, in light of all the evidence, that it is more likely than not that impermissible discrimination exists, the plaintiff is entitled to prevail.

Bazemore v. Friday, —— U.S. ——, 106 S.Ct. 3000, 3009 (1986).

Similarly, while the existence of subjective decision-making practices should not shift the burden to the em-

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[14] Petitioner erroneously characterizes *Hazelwood* as an adverse impact case. Pet. Br. at 29. The Court in *Hazelwood* expressly noted that the plaintiff's theory was that "'the [employer], in violation of § 703(a) of Title VII, regularly and *purposefully* treated Negroes . . . less favorably than white persons.'" *Id.*, 433 U.S. at 306 n.12 (quoting *Teamsters v. United States*, 431 U.S. at 335) (emphasis added).

[15] Counsel of record is the co-author of this treatise.

ployer to prove job-relatedness, this is one fact that may be considered in determining whether the plaintiff has proved discriminatory intent. *See, e.g., Davis v. Califano*, 613 F.2d 957, 965 (D.C. Cir. 1979) (noting that subjective standards should be "closely scrutinized" for unlawful bias); B. Schlei & P. Grossman, *supra*, at 1317 n.79. Given this wide range of evidence, proving discriminatory intent is hardly a "virtual impossibility." To the contrary, the numerous victories of plaintiffs in Title VII cases constitute ample evidence that where an employer has actually engaged in a pattern of discrimination, plaintiffs can prove it.[16]

Were the Court to adopt petitioner's view, the disparate treatment pattern and practice theory articulated in *Teamsters* and *Hazelwood* would soon become a disused relic. No rational plaintiff would attempt to compile evidence suggesting a pattern of intentional discrimination, if merely showing the existence of a statistical disparity was enough to force the employer to prove that its entire system of employment decisionmaking was not only nondiscriminatory, but job-related as well. Petitioner concedes as much, noting that the "disparate treatment [theory] is the exception rather than the rule in the fight to end racial injustice" which should be employed only if "there is no evidence to support an impact sufficient to invoke *Griggs*." Pet. Br. at 25. Petitioner's view should

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[16] Indeed, petitioner's brief refers to direct evidence of discrimination, Pet. Br. at 4 n.5 (the personnel manager allegedly told the petitioner "[i]t's a lot of money, you know, for blacks to have to count" when considering her for a teller position), comparative evidence, Pet. Br. at 9-10 (noting differential treatment of experience, ability to get along with others, and other factors in consideration of petitioner and white employees) and statistical evidence, Pet. Br. 11-16, (noting unexplained significant disparities in promotions and performance appraisals). If petitioner were correct in stating that the Bank offered no explanation or rebuttal of this evidence, petitioner should have prevailed on her disparate treatment claim.

be rejected because it stands the intent of Congress on its head and renders meaningless the well-developed distinction this Court has drawn between adverse impact and pattern and practice disparate treatment cases.

III. REQUIRING PROFESSIONAL VALIDATION OF EVERY ASPECT OF AN EMPLOYER'S SUBJECTIVE DECISIONMAKING PROCESS WOULD HAVE DISASTROUS CONSEQUENCES FOR EMPLOYERS.

Because she has shown a cumulative statistical disparity in overall appraisal or promotion results at the Bank, petitioner contends that the Bank is obligated to validate every aspect of its appraisal and promotional decisionmaking process for every job at the Bank. It would impose an enormous burden on the Bank and on employers generally if the Court were to adopt this position.

Professional validation of selection procedures is an extraordinarily expensive and time-consuming undertaking. The Uniform Guidelines on Employee Selection, 29 C.F.R. Part 1607, outline technical standards for the three accepted methods for validating selection procedures —criterion validity studies, content validity studies, and construct validity studies. A criterion validity study at a minimum requires:

1) preparation of a job analysis for each job in question which identifies performance measures or criteria that are relevant to critical job duties, work behavior or work outcomes, 29 C.F.R. § 1607.14(B)(2);

2) development of an unbiased method for measuring each of the performance measures or criteria, 29 C.F.R. § 1607.14(B)(3);

3) calculation and evaluation of the statistical relationship between selection procedure scores and performance measures "using professionally acceptable statistical procedures," 29 C.F.R. § 1607.14(B)(5);

4) calculation and evaluation of the correlation coefficient between selection procedure scores and performance measures, 29 C.F.R. § 1607.14(B)(6), and

5) if technically feasible, a separate fairness study that examines whether a selection procedure unfairly denies opportunities to members of a particular group, 29 C.F.R. § 1607.14(B)(8).

A content validity study has equally exacting requirements, including:

1) preparation of a job analysis for each job in question which analyzes the important observable work behaviors required for successful performance, their relative importance, and any observable work product, 29 C.F.R. § 1607.14(C)(2);

2) acquisition or development of a selection procedure designed to measure these behaviors, 29 C.F.R. § 1607.14(C)(3);

3) demonstration that the selection procedure accurately measures a representative sample of typical job behaviors or work products, 29 C.F.R. § 1607.14(C)(4);

4) if the procedure attempts to measure a knowledge, skill or ability, a showing that the knowledge, skill or ability is:

a) operationally defined;

b) accurately measured by the selection procedure; and

c) used in the job as a necessary prerequisite to a critical work behavior, 29 C.F.R. § 1607.14(C)(4);

5) whenever feasible, an appropriate statistical estimate of reliability, 29 C.F.R. § 1607.14(C)(5); and

6) if the procedure is used to rank persons, a separate showing that the procedure accurately measures

those aspects of performance which differentiate among different performance levels, 29 C.F.R. § 1607.14(C)(9).

Construct validity studies are even more complex and may involve aspects of both criterion validity and content validity studies. The Uniform Guidelines advise:

> The user should be aware that the effort to obtain sufficient empirical support for construct validity is both an extensive and arduous effort involving a series of research studies, which include criterion related validity studies and which may include content validity studies.

29 C.F.R. § 1607.14(D).

Conducting one or more validity studies under these guidelines is extremely burdensome for employers, even if they are only required to validate a single objective test or requirement for a particular job. *See, e.g.*, Lerner, *Employment Discrimination: Adverse Impact, Validity, and Equality*, 1979 Sup. Ct. Rev. 17, 18 n.6 (citing estimate that "adequate criterion validity studies tend to cost something between $100,000 and $400,000 and . . . take approximately two years"); Gwartney, Asher, Haworth & Haworth, *Statistics, the Law and Title VII: An Economist's View*, 54 Notre Dame Law. 633, 643 (1979) ("Employers seeking to validate the job-relatedness of a single employee characteristic such as an arithmetic test for machinists could expect to incur validation costs ranging from $20,000 to $100,000."). Requiring an employer to validate every aspect of every subjective selection decision for every one of its jobs based on nothing more than an overall statistical disparity in promotions or performance appraisals would be immensely more burdensome. This is particularly true in the subjective decisionmaking context where validation requires analysis of both the selection procedure and each individual responsible for making selection decisions. As the Brief for *Amicus Curiae* American Psychological Association ("the APA Brief") puts it, "[t]he validity of the *interviewer*

must also be established" (APA Br. at 16) (emphasis in original). This requires an examination of the amount and type of training each decisionmaker has received and potentially a review of each decisionmaker's prior decisions "to identify those interviewers whose decisions are most reliable and valid and rely on those interviewers singly to make judgments." *Id.*[17]

Petitioner contends that requiring validation of subjective decisionmaking practices would not be burdensome. For this point, she relies almost exclusively on the *amicus* brief submitted by the APA. The APA does argue that "[s]ubjective selection devices *can* be scientifically validated for the assessment of individuals for hiring, promotion, or other selection decisions in the employment context." APA Br. at 2. (emphasis in original). One searches the APA brief in vain, however, for any suggestion that such validation procedures are not time consuming, burdensome or costly. Indeed, the APA does not cite a single case in which subjective employment decisionmaking procedures have ever been successfully validated under the exacting standards it proposes.[18]

Similarly, petitioner argues that generalized validation studies are available from publishers or other sources that can be used by small employers in lieu of conducting their

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[17] At least with an adverse impact challenge to an objective employment standard, the employer wins by proving that the standard is job-related, absent a showing by plaintiff that less discriminatory alternatives are available. *See* B. Schlei & P. Grossman, *supra*, at 91-92. In the subjective context, even if the employer's procedures have been professionally validated, the employer may still be vulnerable to a claim of disparate treatment. Plaintiffs are thus afforded two bites at the apple.

[18] The Association is also not an entirely disinterested party. Were the Court to adopt the Association's position, Title VII would be transformed into a full employment bill for industrial psychologists, since every employer in the United States that was unwilling to use quotas would have to attempt professional validation of all its employment procedures.

own studies. Pet. Br. at 63. The Uniform Guidelines, however, caution that:

> If there are variables in the other studies which are likely to affect validity significantly, the user may not rely upon such studies, but will be expected either to conduct an internal validity study or to comply with section 6 above [referring to elimination of adverse impact].

29 C.F.R. § 1607.7 (D). Since the training and track record of individual decisionmakers is a critical variable in assessing the validity of subjective decisionmaking procedures, the use of validity studies prepared by publishers or other employers would not appear to be an option in the subjective decisionmaking context.

Petitioner also contends that requiring validation would not be burdensome because "[b]efore any validation must take place, the plaintiff must show impact." Pet. Br. at 63. Unfortunately, however, an employer cannot know in advance whether a particular subjective decisionmaking process will have an adverse impact. If an employer waits until adverse impact has already occurred and then attempts unsuccessfully to validate its procedures, it faces exposure to massive back pay liability under Title VII. The only way to avoid this exposure is either to validate professionally every aspect of every subjective decisionmaking process for every job[19] or to make certain that adverse impact will never result by adopting an informal quota system. Given the enormous cost of the former alternative, almost every employer will be forced to resort to quotas if this Court adopts petitioner's views. *See Connecticut v. Teal*, 457 U.S. at 463 (Powell, J., dissenting) ("For state and local governmental employers with limited funds, the practical effect of today's decision may well be the adoption of simple quota hiring."); *Al-*

[19] Even this alternative offers no guarantee against Title VII liability, as there is always a risk that a court will second-guess the adequacy of a validity study.

bemarle Paper Co. v. Moody, 422 U.S. at 449 (Blackmun, J., concurring in the judgment) ("[A] too-rigid application of the EEOC Guidelines will leave the employer little choice, save an impossibly expensive and complex validation study, but to engage in a subjective quota system of employment selection.").[20]

A requirement that employers use quotas—either formally or informally—is contrary to Title VII. Congress added Section 703(j) to Title VII to "state[] expressly that the statute did not require an employer or labor union to adopt quotas or preferences simply because of a racial imbalance." *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, —— U.S. ——, 106 S. Ct. 3019, 3043-44 (1986) (plurality opinion of Brennan, J.); *accord United Steelworkers of America v. Weber*, 443 U.S. 193, 205-06 (1979). The adverse impact test should not be applied so broadly that it renders this limitation meaningless.

In enacting Title VII, Congress also sought to protect "'management prerogatives . . . to the greatest extent possible.'" *Id.* at 206 (quoting H.R. Rep. 914, 88th Cong., 1st Sess., pt. 2, at 29 (1963)); *accord Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981). It would be difficult to imagine a more serious infringement on management prerogatives than a requirement that all employment decisions must either be

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[20] The courts themselves might wonder, for example, how they would go about professionally validating the subjective procedures they use to identify those elusive qualities that distinguish excellent law clerks. Would the courts have to use an industrial psychologist who would create a selection procedure and "choose the domain to be assessed, construct the items to which test takers will respond or select the behaviors to be observed, develop scoring scales and norms so that results can be interpreted, prepare manuals, and most importantly, ensure that the instrument is psychometrically sound"? APA Br. at 9. The courts would have to confront this question unless the use of quotas guaranteed that no race, gender or ethnic group suffered adverse impact in selection for law clerk positions.

subject to informal quotas guaranteeing an absence of adverse impact or be professionally validated in every respect by industrial psychologists. That is precisely the principle that petitioner seeks to establish here.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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